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July 21, 2014
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Patricia R. Capps, f/k/a Patricia Anderson, Terrel A. Anderson, a/k/a Terral Anderson,

Plaintiffs, Appellants and Cross-Appellees,

and

The Estate of Ruth A. Nelson, Deceased,

Plaintiff and Appellee,

v. — Supreme Court No. 20140110

Colleen L. Weflen, a/k/a Colleen Weflen, a single woman, Marleen Weflen, f/k/a Marleen W. Tiedt, Sharon Kruse, a/k/a Sharon O. Kruse, a married woman dealing in her sole and separate property, Catherine Harris, f/k/a Cathy Gunderson, a single woman, Norris Weflen, a/k/a Norris L. Weflen, a single man, Windsor Bakken, LLC, a Delaware Limited Liability Company,

Defendants, Appellees and Cross-Appellants,

and

John H. Holt Oil Properties, Inc., Atomic Oil & Gas, a Colorado Limited Liability Company,

Defendants and Appellees,

and

Gulfport Energy Corporation, EOG Resources, Inc., Whiting Oil and Gas Corporation,

Defendants, Appellees, and Cross-Appellants,

and

Cade Oil and Gas, LLC, Gerald C. Wools, Penny Brinks, Michael Lee, Gwen Hassan, and Melissa Kellor,

Defendants and Appellees.

Appeal from Summary Judgment entered on March 21, 2014
Civil No. 31-10-C-00009
County of Mountrail, Northwest Judicial District
Honorable David W. Nelson, Presiding

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**REPLY BRIEF OF DEFENDANT/APPELLEE/CROSS-APPELLANT EOG RESOURCES, INC.**

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## LAW AND ARGUMENT

### I. Where the Record Owner's Address Appears of Record, No Inquiry is Required.

[¶ 1] Where the record owner's address appears of record, no inquiry is required. This bright line rule is evident in the plain language of the applicable version of Section 38-18.1-06 of the North Dakota Century Code. Section 38-18.1-06 (2005) requires notice by mail "if the address of the mineral interest owner is shown of record or can be determined upon reasonable inquiry." N.D.C.C. § 38-18.1-06(2) (2005). Further, this rule was solidified in the three cases of *Johnson v. Taliaferro*, 2011 ND 34, 793 N.W.2d 804, *Sorenson v. Felton*, 2011 ND 33, 793 N.W.2d 799, and *Sorenson v. Alinder*, 2011 ND 36, 793 N.W.2d 797.

[¶ 2] The Capps Appellees argue an inquiry was required in this case because the address of the actual owner was not shown of record. The Capps Appellees claim the term "record owner" "is a term invented to deflect the unambiguous meaning of the word 'owner' contained in N.D.C.C. § 38-18.1-06(2)." Capps Response Brief, p. 2. It is unclear who the Capps Appellees accuse of "inventing" the term. This Court, in *Johnson*, *Felton*, and *Alinder* clearly held that the key issue was whether the address of the record owner appeared of record. *See Johnson*, 2011 ND 34, ¶ 11, 793 N.W.2d at 806; *Felton*, 2011 ND 33, ¶¶ 14–15, 798 N.W.2d at 804 (noting the public record may be relied upon in such cases even where the information is incorrect or out of date); *Alinder*, 2011 ND 36, ¶ 6, 793 N.W.2d at 799 (noting "mineral interest owners . . . shown of record" were deceased). Particularly, in *Alinder*, the record owner had been deceased for fifty years when notice was attempted, and was therefore clearly not the actual owner of

the minerals.[1] *See Alinder*, 2011 ND 36, ¶ 2, 793 N.W.2d at 798. Despite this, the Court held an inquiry was not required. *Id.* at ¶ 6, 799. Thus, North Dakota Supreme Court case law dictates an inquiry is not required where the record owner's address appears of record.

[¶ 3] The Capps Appellees also attempt to undermine the precedential effect of *Alinder* by claiming "the opinion did not address the effect [the record owners'] deaths had on the notice requirement." Capps Response Brief, p. 7. It appears the Capps Appellees are implying this Court failed to observe the record owners in *Alinder* were deceased when it issued its opinion in that matter. However, the facts and holding in *Alinder* are clear and concise. The Court explicitly noted the length of time that had passed since the record owners passed away and held that, regardless of their deaths, all that was required under the Act is mailing notice to the record owners' record address. *See Alinder*, 2011 ND 36, ¶¶ 2, 6, 793 N.W.2d at 798, 799. The Capps Appellees' attempts to avoid the clear holding in *Alinder* are unpersuasive and should be ignored by this Court.

## II. Certified Mail is Appropriate under Chapter 38-18.1.

[¶ 4] As set forth in EOG's principal brief, Chapter 38-18.1 provides that a notice of lapse shall be mailed to the last known address of the record mineral interest owner. *See* N.D.C.C. § 38-18.1-06(2). The district court held mailing via certified mail was in

[1] The Capps Appellees disingenuously pretend to miss the point when they state, "the precedential effect of a determination that dead people can own property is revolutionary." Capps Response Brief, p. 8. Neither the Court nor any party to this action has ever suggested that a deceased person can remain the legal owner of property. Statutory law is clear in North Dakota that ownership of real property automatically passes upon death. *See* N.D.C.C. § 30.1-12-01.

violation of the statute because the statute "does not require a notice of lapse to be mailed by certified mail, return receipt, restricted delivery." (Capps App. 115.) The Capps Appellees agree with the district court, noting that the statute does not explicitly require a particular type of mailing. Capps Response Brief, p. 6. However, the Capps Appellees and the district court failed to provide any authority for the proposition that the Act <u>prohibits</u> any particular type of mailing. The Capps Appellees primary complaint with sending the notice via certified mail is that it made it less likely the notice would reach the actual owner of the minerals. *See id.* at p. 6–7. However, it was not the method of mailing that made it less likely the actual owner would receive the notice via mail. Rather, it was the Capps Appellees thirty-year failure to take a single step to protect their mineral interest, or ensure that the public property records were up to date. Accordingly, it is the Capps Appellees' failing, and not the Weflens', that caused the actual owner to not receive the notice of lapse in this instance.[2]

## III. <u>Chapter 38-18.1 is Constitutional.</u>

[¶ 5] The argument by the Capps Appellees that the Act is unconstitutional as applied in this case rests entirely on the incorrect premise that the Act is not self-executing. The North Dakota Attorney General and North Dakota Supreme Court have both held the Act is self-executing. *See* Letter O'pn Att'y Gen., 95-L-44; *see also Johnson*, 2011 ND 34, ¶¶ 13, 17, 7983 N.W.2d at 807–08. In *Johnson*, the Court, citing the Act, held title to an abandoned mineral interest automatically vested in the surface owners upon the first publication of the notice of lapse. *Johnson*, 2011 ND 34, ¶ 17,

[2] It is important to remember that, while notice via mail was unsuccessful due to out of date public property records, notice via publication was also made in compliance with the Act (*See* Capps App. 128).

7983 N.W.2d at 808. The Court then held the quiet title provisions of the Act, which were added in 2009, "cannot be used to deprive the [surface owners] of an interest in the minerals that has already vested . . . ." *Id.* Thus, the Act is self-executing and the quiet title provisions merely serve to allow a surface owner a method of clearing a cloud on the title.

[¶ 6] The Capps Appellees completely ignore both the Attorney General and the North Dakota Supreme Court, citing neither in their analysis regarding the constitutionality of the Act. Instead, the Capps Appellees begin from the erroneous premise that because the issue of whether a reasonable inquiry was made is a question of fact, "a question of fact always exists" and therefore "a judicial determination is always going to be necessary to determine whether proper notice was given." Capps Response Brief, p. 11. This ignores *Johnson*, where the Court explicitly held that title to abandoned mineral interest automatically vests in the surface owners upon the first publication of the notice of lapse. *Johnson*, 2011 ND 34, ¶ 17, 7983 N.W.2d at 808. Thus, a quiet title action is not required for title to transfer to the surface owners. This happens automatically upon publication of the notice of lapse. The Act is therefore self-executing and the Capps' Appellees' constitutional analysis is incorrect.[3]

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[3] The Capps Appellees also claim the Act is not self-executing because "[t]he notice must be mailed," and the surface owner must file a document with the county recorder. Capps Response Brief, p. 12. The Capps Appellees offer no authority for their position that (1) these actions are required for title to vest in the surface owner, and (2) either of these actions somehow constitutes "state action" that would prevent the Act from being considered self-executing. The Capps Appellees have certainly offered no justification for a position that is contrary to the opinion of the North Dakota Attorney General and the decision of the North Dakota Supreme Court in *Johnson*.

[¶ 7] Further, the Capps Appellees confuse the notice of lapse requirements with the notice requirements for a subsequent quiet title option. As the United States Supreme Court held, "it is essential to recognize the difference between the self-executing feature of the statute and a subsequent judicial determination that a particular lapse did in fact occur." *Texaco, Inc. v. Short*, 454 U.S. 516, 533 (1982); *see also id.* at 535 ("The reasoning in *Mullane* is applicable to a judicial proceeding brought to determine whether a lapse of a mineral estate did or did not occur . . . ." (citing *Mullane v. Cent Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)). In other words, the *Mullane* analysis is inapplicable to the sufficiency of notice required to cause an abandoned mineral interest to vest in the surface owners, but rather would apply to determine whether sufficient notice of a subsequent quiet title action was given. This distinction was highlighted in *Johnson*, where the surface owners did not conduct an inquiry, mailing the notice of lapse to the record mineral owner's outdated address, which was permissible under the Act. *Johnson*, 2011 ND 34, ¶¶ 4–5, 793 N.W.2d at 805. When the surface owners later initiated a quiet title action to clear any potential cloud on their title to the minerals, they conducted an inquiry and mailed the summons and complaint to the owner's current address, in compliance with Rule 4 of the North Dakota Rules of Civil Procedure. *Johnson*, 2011 ND 34, ¶ 6, 793 N.W.2d at 806.

## CONCLUSION

[¶ 8] Based on the foregoing, EOG respectfully requests this Court overturn the judgment of the district court granting the Appellees' Motion for Reconsideration and denying the Weflen Appellants' Motion for Summary Judgment.

DATED this 21st day of July, 2014.

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By *_/s/ Amy L. De Kok_*

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Defendants and Appellees.

Supreme Court No. 20140110

**CERTIFICATE OF SERVICE**

STATE OF NORTH DAKOTA )
) ss.
COUNTY OF BURLEIGH )

I hereby certify that on July 21, 2014, I electronically filed with the Clerk of the North Dakota Supreme Court the REPLY BRIEF OF DEFENDANT/APPELLEE/CROSS-APPELLANT EOG RESOURCES, INC. and served the same electronically as follows:

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